Office - Supreme Court, U.S.
FILED
SEP 16 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2407

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GEORGE MISKOVSKY,
Petitioner,
v.
THE OKLAHOMA PUBLISHING COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oklahoma

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

BRADLEY G. MCDONALD
Counsel of Record
JAMES L. LYONS
JOHN F. KARL, JR.
HEIDI J. ACKERMAN
1919 Pennsylvania Avenue
Suite 300
Washington, D.C. 20006
(202) 338-7800

EVERETT J. SWEENEY
E. JOE LANKFORD
303 South Peters
Norman, Oklahoma 73069
(405) 360-2254

CARROLL E. GREGG
830 Hightower Building
Oklahoma City, Oklahoma 73102
(405) 235-1375

Attorneys for Petitioner

Of Counsel:
DAVID A. ANDERSON
4111 Shoal Creek Blvd.
Austin, Texas 78756
(512) 471-5151

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
I. THIS COURT HAS JURISDICTION OVER MISKOVSKY'S FIRST QUESTION	1
A. Respondent Misstates Petitioner's First Question	2
B. Miskovsky May Properly Raise The Issue Of The Burden Of Proving Falsity Under The Constitution	4
C. The Question Of Whether A Public Figure Libel Plaintiff Must Bear The Burden Of Proving Falsity By Clear And Convincing Evidence Is An Important Constitutional Question Which Needs To Be Decided	5
II. THE DECISION OF THE OKLAHOMA SUPREME COURT WAS NOT BASED ON ADEQUATE AND INDEPENDENT STATE GROUNDS	6
III. RESPONDENT CONFUSES *DE NOVO* REVIEW OF A FINDING OF ACTUAL MALICE WITH SUBSTITUTION OF JUDGMENT	7
IV. RESPONDENT MISPERCEIVES MISKOVSKY'S FOURTH ARGUMENT	9
CONCLUSION	10

TABLE OF AUTHORITIES

Cases:	Page
Akins v. *Altus Newspaper, Inc.*, 609 P.2d 1263 (Okla. 1980), *cert. denied*, 449 U.S. 1010 (1980)	3, 5
Grayson v. *Harris*, 267 U.S. 352 (1925)	6
Hames v. *Anderson*, 571 P.2d 831 (Okla. 1977)	4
Herndon v. *Georgia*, 295 U.S. 441 (1935)	4
Hutchinson v. *Proxmire*, 443 U.S. 111 (1979)	8
Nebraska Press Association v. *Stuart*, 427 U.S. 539 (1976)	8
New York Times v. *Sullivan*, 376 U.S. 254 (1964)	*passim*
Orr v. *Orr*, 440 U.S. 268 (1979)	6
St. Amant v. *Thompson*, 390 U.S. 727 (1968)	8
Southwestern Bell Tel. Co. v. *State of Oklahoma*, 303 U.S. 206 (1938)	6
Thompson v. *Newspaper Printing Corp.*, 325 P.2d 945 (Okla. 1958)	7
Time, Inc. v. *Hill*, 385 U.S. 374 (1966)	8
United Air Lines, Inc. v. *Mahin*, 410 U.S. 623 (1973)	6
Wat Henry Pontiac v. *Pitcock*, 301 P.2d 203 (Okla. 1956)	*passim*
Webb v. *Webb*, 451 U.S. 493 (1981)	2
Wilson v. *Scripps Howard-Broadcasting Co.*, 642 F.2d 371 (6th Cir. 1981), *cert. granted*, 102 S.Ct. 500 (1981), *cert. dismissed per stipulation*, 102 S.Ct. 984 (1981)	4
Winters v. *Morgan*, 576 P.2d 1152 (Okla. 1978)	7
Wright v. *Haas*, 586 P.2d 1093 (Okla. 1978)	7

Statutes:	
28 U.S.C. § 1257 (1977)	1
Okla. Stat. Ann. tit. 12 § 1443	7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2407

GEORGE MISKOVSKY,

Petitioner,

v.

THE OKLAHOMA PUBLISHING COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oklahoma

---

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

This Court should grant review because the decision of the Oklahoma Supreme Court raises significant and heretofore undecided constitutional questions affecting media defendants, candidates for public office, and rights of voters to exercise fully and fairly their right of suffrage. As we show, the reasons which OPUBCO advances for opposing the writ are groundless.

I. THIS COURT HAS JURISDICTION OVER MISKOVSKY'S FIRST QUESTION.

Under 28 U.S.C. § 1257, this Court has jurisdiction by writ of *certiorari* "where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . . of the United States." Here, respondent OPUBCO appealed to the Oklahoma Supreme Court on constitutional grounds arguing, *inter alia*, that there was insufficient evidence of falsity and of constitutional ac-

tual malice under *New York Times* v. *Sullivan*, 376 U.S. 254 (1964). The Oklahoma Supreme Court accepted OPUBCO's arguments, ruled in favor of OPUBCO on constitutional grounds, and declined to even discuss the alternate state grounds advanced by OPUBCO in its Brief. For this Court to have jurisdiction over this case, the constitutional claim must have been presented to and decided by the highest state court. *Webb* v. *Webb*, 451 U.S. 493, 495-496 (1981). Because both parties briefed the constitutional issues before the Oklahoma Supreme Court and because the Oklahoma Supreme Court ruled in favor of OPUBCO on constitutional grounds, OPUBCO may not claim that these issues were not presented to and decided by the highest state court.

A. Respondent Misstates Petitioner's First Question.

Respondent argues that this Court lacks jurisdiction because Miskovsky failed to object to Jury Instruction #5. Respondent's Brief misstates the question and misreads the jury instructions. It is clear from the decision of the Oklahoma Supreme Court that in its *de novo* review the court required Miskovsky to show "with convincing clarity" defamation, falsity and actual malice. Petition at 7a, 9a. It is equally clear that the trial court, on the other hand, only required Miskovsky to prove libel and defamation by a "preponderance of the evidence."[1] Jury instruction #5, Petition at 34a-35a. The state supreme court incorrectly believed that Oklahoma law on the issues of defamation and falsehood had been superseded by and controlled by requirements of the Federal Constitution. Accordingly, the Oklahoma Supreme Court erroneously en-

---

[1] "Libel is 'a false or malicious unprivileged publication by writing, printing, picture, or effigy or other fixed representation to the eye, which exposes any person to public hatred, contempt, ridicule or obloquy, or which tends to deprive him of public confidence, or to injure him in his occupation . . .'" Jury Instruction #12, Petition at 37a.

Miskovsky claimed that OPUBCO falsely accused him of criminal libel, criminal conspiracy, and unlawfully injured his personal and professional reputation and candidacy for public office.

gaged in *de novo* review of all of the evidence on the issues of defamation and falsehood.

Both parties agree that a finding of actual malice is a constitutional fact subject to *de novo* review by an appellate court. Petition at 13 and cases cited. However, petitioner contends that *de novo* review of defamatory meaning and falsehood under a standard of "convincing clarity" is not required by the Constitution or by this Court's holding in *New York Times*. A fair reading of the Oklahoma Supreme Court's opinion compels the conclusion that this is exactly what the state court did. OPUBCO implicitly recognizes the intellectual validity of the framework of petitioner's first question, but chooses to completely ignore Miskovsky's argument regarding libel and defamatory meaning by focusing *solely* on the alleged failure of Miskovsky to object to the jury instructions on the burden of proof.

Two different errors relating to libel and defamatory meaning resulted from the Oklahoma Supreme Court's erroneous belief that the entire Oklahoma law of defamation had been constitutionalized by *New York Times* and its progeny. Petitioner contends that a fair reading of the state court's decision demonstrates that the Oklahoma Supreme Court imposed on Miskovsky the burden of proving defamatory meaning "with convincing clarity." Petition at 7a and 9a. This was a much higher burden of proof than that required by the trial court, which stated that Miskovsky was required to prove libel and defamatory meaning "by a preponderance of the evidence." Jury Instruction #5, Petition at 35a. In addition to imposing this excessive burden of proof on Miskovsky, the Oklahoma Supreme Court engaged in a *de novo* review of the evidence of defamatory meaning, a sweeping review contrary to the Oklahoma law of defamation. *Wat Henry Pontiac* v. *Pitcock*, 301 P.2d 203, 207 (Okla. 1956); *Akins* v. *Altus Newspaper, Inc.*, 609 P.2d 1263, 1266-1267 (Okla. 1980), *cert. denied*, 449 U.S. 1010 (1980); Petition at 12-13 n.6.

B. Miskovsky May Properly Raise The Issue Of The Burden Of Proving Falsity Under The Constitution.

After the decision of the Oklahoma Supreme Court, Miskovsky petitioned for rehearing. Miskovsky raised eight different constitutional arguments, including the contention that the state court decision erroneously assigned to him the burden of proving falsity by clear and convincing evidence. Jury Instruction #5, Petition at 35a. Brief in Support of Petition for Rehearing at 11. Miskovsky was entitled to raise this issue under Oklahoma law because his failure to object to the jury instructions on this issue was not a waiver of his right to appeal any issues concerning the burden of proof on falsity. Under Oklahoma law, objection to jury instructions is waived only "*absent fundamental error.*" *Hames* v. *Anderson*, 571 P.2d 831, 833 n.2 (Okla. 1977) (emphasis supplied); *Wat Henry Pontiac*, 301 P.2d at 207. However, the decision of the state court in allocating so heavy a burden of proving falsity to Miskovsky was fundamental error where OPUBCO failed to present any evidence whatsoever.[2] As soon as the significance of this fundamental error became apparent, Miskovsky sought a rehearing. Thus, this issue is preserved for appeal under Oklahoma state law.

Although the general rule is that after judgment the attempt to raise a federal question by a petition for rehearing comes too late, this principle is subject to an exception. *Herndon* v. *Georgia*, 295 U.S. 441, 443 (1935). "[I]f the ruling of the state court could not have been anticipated and a petition for rehearing presents the first

---

[2] By the time of the Oklahoma Supreme Court's decision on January 12, 1982, this Court had granted the petition for *certiorari* in *Wilson* v. *Scripps Howard-Broadcasting Co.*, 642 F.2d 371 (6th Cir. 1981), *cert. granted*, 102 S.Ct. 500 (1981), *cert. dismissed per stipulation*, 102 S.Ct. 984 (1981). Since one of the issues in *Wilson* was whether the trial court improperly assigned to the plaintiff the burden of proving falsity in a private figure case, the granting of the writ of *certiorari* emphasized the nature of the error in the jury instruction.

opportunity for raising it," then the federal question may properly be raised before this Court. *Id.* at 444. Miskovsky had no real opportunity to raise the issue of the burden of proving falsity in his Brief because he won at trial after OPUBCO declined to present a case at trial and Miskovsky was satisfied with the jury's verdict.

Moreover, even if Miskovsky may not object to the instruction of the trial court assigning to him a constitutional standard of proving falsity by "clear and convincing evidence," there is still clear constitutional error in the opinion of the Oklahoma Supreme Court. The appellate court engaged in a *de novo* review of the evidence presented at trial in reaching its decision that Miskovsky had not proved falsity by "clear and convincing evidence" under the erroneous belief that it was required to do so under *New York Times*. Had the Oklahoma Supreme Court not done so, it would have deferred to the jury's verdict under well-established Oklahoma legal principles which limit the scope of review of factual findings of a jury. *Wat Henry Pontiac*, 801 P.2d at 207; *Akins*, 609 P.2d at 1266-1267.

C. The Question Of Whether A Public Figure Libel Plaintiff Must Bear The Burden Of Proving Falsity By Clear And Convincing Evidence Is An Important Constitutional Question Which Needs To Be Decided.

OPUBCO argues that the burden of proof on the issue of falsity "is not an important federal question that needs to be decided by this Court." Opposition at 6 n.5. The question of who must carry what burden of proof on the question of falsity has been the subject of learned law review articles and opinions of many federal courts of appeal and state appellate courts. Petition at 16-17 n.12, 13. Placing on plaintiff the burden of proving with "convincing clarity" the falsity of a libelous statement effectively emasculates the law of libel and prevents public figures from protecting their reputations or vindicating

their First Amendment rights. Understandably, OPUBCO may not wish to have this Court decide this issue; however, this does not in any way detract from the importance of the question.

II. THE DECISION OF THE OKLAHOMA SUPREME COURT WAS NOT BASED ON ADEQUATE AND INDEPENDENT STATE GROUNDS.

This Court has jurisdiction where the decision of the federal constitutional question was necessary for the determination of the case and where the federal question was actually decided. The Oklahoma Supreme Court did not base its decision on independent state grounds and the judgment rendered could not have been given without deciding the constitutional question. *Southwestern Bell Tel. Co.* v. *State of Oklahoma*, 303 U.S. 206, 212-213 (1938). Where the non-federal grounds for the decision were not considered by the state court, this Court has jurisdiction. *Grayson* v. *Harris*, 267 U.S. 352, 358 (1925). It is irrelevant to the Supreme Court's jurisdiction that the decision below could have been based on adequate and independent state grounds. *Orr* v. *Orr*, 440 U.S. 268, 274, 277 (1979). The mere possibility that the state court might have reached the same conclusion if it had decided the question purely as a matter of state law does not divest this court of jurisdiction. *United Air Lines, Inc.* v. *Mahin*, 410 U.S. 623, 630-631 (1973).

Initially, it may be noted that if the Oklahoma Supreme Court intended to base its decision on grounds of state law, it certainly would have said so.[8] Petitioner contends that a fair reading of the state court's opinion leaves no doubt that the court was interpreting *New York Times* and its progeny in the belief that these cases supplanted the Oklahoma law of libel.

---

[8] The Oklahoma Supreme Court stated that "[t]he dispositive issue in this cause is whether the evidence . . . was sufficient to permit the submission of the cause to a jury." Petition at 1a.

Respondent argues that the publication of the three newspaper articles, the editorial and the cartoon was privileged and cites Okla. Stat. Ann. tit. 12 § 1443 as the adequate and independent state grounds for the Oklahoma Supreme Court's decision. This statute was not quoted in the state court's opinion (even though the issue was briefed). The wording of the statute refers to "public officers" and on its face this provision does not extend a privilege to protect criticism of Miskovsky who is a public figure, but not a public official.

Furthermore, the trial court instructed the jury that OPUBCO could not claim privilege under state law if Miskovsky proved by a preponderance of the evidence that the publications accused him of committing criminal libel or engaging in criminal conspiracy. Jury Instruction #11, Petition at 37a; *Thompson* v. *Newspaper Printing Corp.*, 325 P.2d 945, 947 (Okla. 1958); *Winters* v. *Morgan*, 576 P.2d 1152, 1156 (Okla. 1978); *Wright* v. *Haas*, 586 P.2d 1093, 1097 (Okla. 1978). Clearly, the opinion of the Oklahoma Supreme Court does not purport to find the jury instruction or the jury findings on the issue of privilege erroneous under state law. Under settled principles of Oklahoma law which require deference to the findings of a jury, the state court would not have overturned such findings of fact by the jury. *See Wat Henry Pontiac* v. *Pitcock*, 301 P.2d at 207. Petition at 12-13 n.6.

III. RESPONDENT CONFUSES *DE NOVO* REVIEW OF A FINDING OF ACTUAL MALICE WITH SUBSTITUTION OF JUDGMENT.

Although state appellate courts (and this Court as well) have the duty of *de novo* review of a jury's finding of actual malice, an appellate court should not freely substitute its judgment for that of the jury. Miskovsky's right to a jury trial is not to be subordinated to the First Amendment rights of a multi-media conglomerate. None of the rights articulated in the Bill of Rights have pri-

ority over the others. *Nebraska Press Association* v. *Stuart*, 427 U.S. 539, 561 (1976).

Further, the duty of *de novo* review of a finding of actual malice is consistent with Chief Justice Burger's admonition in *Hutchinson* v. *Proxmire*, 443 U.S. 111, 120 n.9 (1979), that the issue of actual malice does not lend itself to "summary disposition" and should be decided by a jury. *De novo* review of a finding of actual malice should be limited to a determination of whether there is sufficient evidence for a jury to conclude that the plaintiff proved the existence of actual malice by clear and convincing evidence. Where there is reasonable support in the record for a finding of actual constitutional malice, a reviewing court should defer to the findings of the jury. *Time, Inc.* v. *Hill*, 385 U.S. 374, 394 n.11 (1966).[4]

Miskovsky's petition argues that the Oklahoma Supreme Court made several legal errors in its analysis of the evidence as to whether OPUBCO acted in reckless disregard of the truth. *St. Amant* v. *Thompson*, 390 U.S. 727 (1968); Petition at 18-22. Accordingly, this Court should review the state court opinion to correct that error.

OPUBCO refers to the "strained meaning" given to the cartoon by Miskovsky. Opposition at 11. The jury sitting in Cleveland County, Oklahoma, certainly did not believe that the meaning ascribed to this cartoon by Miskovsky was "strained." OPUBCO's characterization of the cartoon goes right to the heart of one of the issues addressed

---

[4] Respondent contends there was not sufficient evidence of actual malice. Opposition at 11-12. However, respondent completely ignores undisputed evidence that the highest corporate officials and editors of OPUBCO deliberately sought to harm and "blister" Miskovsky at a time when they were actually aware that there was no basis for claiming that Miskovsky conspired with or manipulated Points. Petition at 8-9, 18-19 n. 15, 29a. If there is not on this record sufficient evidence of actual malice for this issue to be properly submitted to the jury, then OPUBCO and all other media defendants are granted absolute immunity from libel actions by public figures.

by Miskovsky's Petition: Who should decide the meaning of the cartoon? Should this factual determination be made by a properly instructed jury or a state appellate court which relied on an erroneous definition of actual malice? Petition at 19.

IV. RESPONDENT MISPERCEIVES MISKOVSKY'S FOURTH ARGUMENT.

Miskovsky squarely raised the issues contained in his fourth reason for review on the opening page of his Brief to the Oklahoma Supreme Court when he stated that "First Amendment rights belong to all the people, not just to media giants like OPUBCO." Appellee's Brief at 1. The press is entitled to no greater protection of its First Amendment rights than is Miskovsky. Allowing OPUBCO the absolute immunity which it claims is tantamount to abolishing the First Amendment rights of candidates for public office who may be out of favor with a local media monopoly.

Respondent characterizes Miskovsky's fourth issue as a request that this Court rule that First Amendment principles be abandoned in election campaigns. Opposition at 13. This characterization is blatantly incorrect. Miskovsky contends that the proper application of the *New York Times* rule with its requirement that a public figure libel plaintiff prove actual malice by clear and convincing evidence also requires a recognition of and balancing between the First Amendment rights of the publisher and those of the candidate. Under *New York Times*, the right of public figures to sue for defamation has not been abolished, but a heavier burden of proof is imposed on a public figure who seeks damages for injury to his reputation. Miskovsky argues that traditional First Amendment principles apply to him as a candidate for public office, not just to OPUBCO. The jury's verdict should be upheld because Miskovsky met the burden of proof required for a public figure to prove malice under *New York Times*.

CONCLUSION

For the foregoing reasons and for the reasons in the Petition, this Court should grant a writ of *certiorari*.

Respectfully submitted,

BRADLEY G. MCDONALD
Counsel of Record
JAMES L. LYONS
JOHN F. KARL, JR.
HEIDI J. ACKERMAN
1919 Pennsylvania Avenue
Suite 300
Washington, D.C. 20006
(202) 338-7800

EVERETT J. SWEENEY
E. JOE LANKFORD
308 South Peters
Norman, Oklahoma 73069
(405) 360-2254

CARROLL E. GREGG
830 Hightower Building
Oklahoma City, Oklahoma 73102
(405) 235-1375

Attorneys for Petitioner

Of Counsel:
DAVID A. ANDERSON
4111 Shoal Creek Blvd.
Austin, Texas 78756
(512) 471-5151